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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 DARYL LOWRY; ) Civil Nos. 09-CV-882-BTM(WVG)  
12 ) 09-CV-898-BTM(WVG)  
13 Plaintiff, ) 09-CV-1141-BTM(WVG)  
14 )  
15 v. ) REPORT AND RECOMMENDATION ON  
16 ) DEFENDANT HERITAGE SECURITY'S  
17 HERITAGE SECURITY, *et al.*, ) MOTION FOR TERMINATING  
18 ) SANCTIONS  
19 Defendants. )  
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28 )  
AND RELATED CASES.

Defendant Heritage Security Services ("Heritage"), moves the Court to impose terminating sanctions against Plaintiff for his obstructive conduct and discovery abuses in the three cases he filed against Heritage and non-moving Defendant, Metropolitan Transit System. (882 Case: Doc. No. 88; 898 Case: Doc. No. 65; 1141 Case: Doc. No. 76.)<sup>1/</sup> Heritage's motion is based on the history of this case, Plaintiff's violation of a court order, and Plaintiff's lie that allowed him to successfully avoid being deposed. After considering all of the above, and after holding a hearing, the

<sup>1/</sup> All further references to documents on the Court's docket are to documents in the 09-CV-882-BTM(WVG) matter.

undersigned RECOMMENDS that Heritage's motion be GRANTED and that all three cases against Heritage be DISMISSED.

**I. BACKGROUND**

**A. General Background**

Filed in April and May of 2009, Plaintiff's cases follow separate run-ins with security personnel aboard and around the San Diego Trolley. According to Plaintiff, Heritage's employees violated his civil rights when they unjustly detained, arrested, or searched him without cause. Plaintiff also alleges the unreasonable use of force to secure his detentions and arrests. As a result, Plaintiff claims he suffered serious injuries, including a "busted" face, which required medical care.

For their part, Defendants claim that security personnel encountered Plaintiff aboard or around the San Diego Trolley after he drew their attention by either exhibiting the signs of being under the influence of alcoholic beverages, refusing to produce proof that he had paid his trolley fare, or by creating disturbances aboard the trolley or on trolley property. They claim Plaintiff was consistently belligerent, refused to cooperate, escalated his disruptive behavior, resisted arrest, and actively attacked security officers after being contacted.

All three cases were transferred to the undersigned's caseload on December 11, 2009. With all three cases now over two years old, the fact discovery cut-off expired on June 10, 2011, without any request for extension of discovery. (See Doc. No. 69 at 2.)

1       **B.       Procedural Background**

2               **1.       October 18, 2010:   Early Neutral Evaluation Conference**

3               On October 18, 2010, the undersigned convened an Early  
4 Neutral Evaluation Conference. Fearing for their safety, counsel  
5 for Defendants requested that the Court have security present during  
6 the ENE. Plaintiff had apparently left several aggressive voicemail  
7 messages for counsel, and they had felt so threatened that they had  
8 sought a restraining order against Plaintiff.<sup>2/</sup> The Court took the  
9 extraordinary measure of having two United States Marshals Deputies  
10 present for the duration of the ENE. In person, the undersigned  
11 observed that Plaintiff was at times visibly agitated and belliger-  
12 ent and expressed at various times that he was "pissed" and  
13 proclaimed: "I ain't afraid of no one. I won't let anyone touch  
14 me," referring to his confrontation with trolley security.  
15 Additionally, Plaintiff directed his aggression towards defense  
16 counsel personally, calling them liars. It was clear to the  
17 undersigned that Plaintiff held an intense emotional stake in his  
18 cases, had difficulty controlling his emotions, and intensely  
19 disliked Defendants and their counsel. As a result, the undersigned  
20 believed Plaintiff would benefit if he retained counsel and strongly  
21 encouraged him to consider doing so. Before concluding the ENE, the  
22 undersigned advised Plaintiff to conduct himself civilly and  
23 explained that the Court would grant him some leeway, but would not  
24 ignore the rules simply because he was proceeding *pro se*. Plaintiff  
25 said he understood.

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<sup>2/</sup> Although counsel represents that an active TRO against Plaintiff exists, the TRO does not appear under Plaintiff's name in the San Diego County Sheriff's public database. See <https://apps.sdsheriff.net/tro/tro.aspx> (last visited July 5, 2011).

1                   **2. December 10, 2010: Case Management Conference**

2                   On December 10, 2010, the undersigned convened a telephonic  
3 case management conference and quickly realized that Plaintiff could  
4 not control himself over the telephone. Perhaps because he was  
5 outside the presence of the Court, Plaintiff often went on emotion-  
6 fueled rants about his injuries and what he perceived as delay  
7 tactics by counsel for Defendants. He routinely interrupted the  
8 undersigned, asserted that Defendants were trying to take advantage  
9 of him, and asserted that he would not back down. He also expressed  
10 that he was seeking representation.

11                   **3. January 6, 2011: Status Hearing**

12                   On January 6, 2011, the undersigned held a status hearing to  
13 allow Plaintiff the opportunity to air his grievances, as he had  
14 called the undersigned's chambers three times after the CMC and  
15 expressed dissatisfaction with the judicial process and Defendants.

16                   On December 28, 2010, Plaintiff called chambers, spoke with  
17 the undersigned's law clerk, and stated he was going to "cheat"  
18 despite the undersigned telling him he could not do so, was going to  
19 appeal Judge Moskowitz's dismissal of his state forgery claim, and  
20 proclaimed: "To hell with what the judge says. I'm coming after  
21 them [Defendants]."

22                   On Thursday, December 30, 2010, at 7:15 p.m., Plaintiff left  
23 a message on chambers voicemail, stated he may have to leave the  
24 state for family reasons, and stated he wanted to meet with the  
25 Court on Monday, January 3, 2011, to discuss his cases. Plaintiff  
26 expressed impatience at the pace of the litigation and stated: "We  
27 have to do something. I'm not going out like a sucker. . . . When  
28 I do come back, I'm gonna hit 'em double." Friday, December 31,

1 2011, was an observed court holiday and the chambers staff did not  
2 return Plaintiff's phone call as a result.

3 On Sunday, January 2, 2011, Plaintiff left a markedly more  
4 agitated message on chambers voicemail and expressed his strong  
5 displeasure that his first message was not returned. He stated:  
6 "I'm not appreciating everything that's going down and what's going  
7 down." He demanded to speak directly to the undersigned and  
8 proclaimed: "I'm standing up for my rights. I'm a veteran and I'm  
9 pissed. I'm very, very, very upset. I don't like the tactics  
10 they're trying to pull. I don't like what the federal courts are  
11 trying to pull. And like I said, I will go to the media." The  
12 overall tone of this message was threatening, not only towards  
13 Defendants but also towards the Court itself.

14 In response to Plaintiff's hostile messages, the Court  
15 convened a status hearing on January 6, 2011, at 8:00 a.m., despite  
16 the fact that the undersigned had the "criminal duty" responsibili-  
17 ties during that week and civil matters are generally not heard as  
18 a result. The Court held the hearing on the record, ordered  
19 Plaintiff's personal appearance to avoid another disruptive  
20 telephone conference, and allowed counsel for Defendants to appear  
21 telephonically. The Court again took the extraordinary measure of  
22 having United States Marshals personnel present in the courtroom  
23 during a civil proceeding.

24 Before the Court, Plaintiff was more subdued but nonetheless  
25 expressed his dissatisfaction with what he perceived as stall  
26 tactics and gamesmanship by Defendants. This perception was based  
27 on his belief that he had an ironclad case and his resulting  
28 displeasure that Defendants refused to immediately pay him all of

1 the money he demanded. Essentially, Plaintiff was frustrated that  
2 Defendants would not simply capitulate to his demands and actually  
3 wanted to litigate the case. He interpreted all of this as a sign  
4 that they intended to unnecessarily prolong the case. In response,  
5 the Court explained that Defendants had the right to litigate the  
6 cases, just as Plaintiff did, and explained that the scheduling  
7 order was standard and was not a result of Defendants' desire to  
8 drag the case out. The undersigned further admonished Plaintiff  
9 about the aggressive and threatening nature of his communications  
10 with the Court, advised him that such behavior was not acceptable,  
11 and generally cautioned him that sanctions may be forthcoming for  
12 continued unacceptable behavior. The undersigned also advised  
13 Plaintiff against engaging in further substantive *ex parte* communi-  
14 cations with the Court.

15 **4. March 25, 2011: Discovery Hearing**

16 On March 25, 2011, the undersigned convened a discovery  
17 hearing after Plaintiff apparently refused to answer several special  
18 interrogatories. The Court also learned that Plaintiff continued to  
19 engage in unacceptably aggressive and threatening behavior towards  
20 defense counsel. Specifically, Plaintiff continued to leave  
21 threatening voicemail messages for counsel, including the following  
22 transcribed message from March 16, 2011:

23 Hey Sam Sherman. How dumb do you think I am? Man  
24 you're stupid, do you know what? Okay, now I want to  
25 see all the citations I signed. There was only one.  
26 So like I say, and one I didn't sign, and I never did  
27 sign it, because it started with a J, which was Jerrod  
28 Gresset forged my signature, so I didn't sign nothing.  
So you know what, here's the deal, I'm gonna fuck you  
just for that man. You're through, okay? Your season  
is over with man, I'm telling you. This is fun. I  
love this shit. Oh man, this is great. You're an  
idiot man, but it's gonna be fun. I'm gonna fuck you  
for this. I'm going to the library right now and type

1       this shit up, ask for a motion for summary judgment,  
 2       and I'm gonna demand [word emphasized] that the judge  
 3       give me that summary judgment. Therefore, I take over  
      the company. Fuck you and the horse you rode in on,  
      okay. Later.

4       (Doc. No. 75 at 4.)<sup>3/</sup> The Court read this transcribed message to  
 5       Plaintiff, who confirmed its accuracy: "Yeah. I was pissed. I was  
 6       upset, very upset, because of what they're trying to do -- motion to  
 7       bring people into my life and invade my private life. I don't like  
 8       that. That's what they're trying to do. They want to find out my  
 9       address, where I live at -" (Doc. No 83 at 9:11-15.)

10       After recounting Plaintiff's continued behavior, the Court  
 11       verbally admonished him that continued obstreperous or obstructive  
 12       conduct could result in sanctions, including a recommendation that  
 13       his cases be terminated. The Court then ordered Plaintiff to  
 14       respond to certain special interrogatories with guidance on how he  
 15       could answer them.

16       After the hearing, the undersigned issued a written order  
 17       that reiterated the verbal orders above and again specifically, and  
 18       in detail, admonished Plaintiff that sanctions could issue. (Doc.  
 19       No. 75.) Specifically, Plaintiff was admonished in no uncertain  
 20       terms that case-dispositive sanctions could be recommended and  
 21       imposed if he continued his unacceptable behavior, failed to  
 22       prosecute, or further delayed his three cases. (Id. at 4-6.)

23       **C. Other Examples of Plaintiff's Behavior**

24       The Court also has had the opportunity to witness Plaintiff's  
 25       general conduct and attitude towards Defendants and their counsel by  
 26       examining the various correspondences and discovery responses he has  
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28       <sup>3/</sup> All page number references to documents on the Court's docket refer to the CM/ECF  
      pagination, not the document's native pagination.

1 sent them. Overall, Plaintiff employs a hostile, argumentative tone  
 2 and engages in personal attacks, even in his discovery responses.  
 3 Sometimes Plaintiff sprinkles barbs and jabs in with responsive  
 4 answers, and other times his responses are completely non-respon-  
 5 sive. In sum, his writings in general resist cooperation and seek  
 6 to make the litigation process as difficult for Defendants as he  
 7 possibly can. The following are some illustrative examples:<sup>4/</sup>

- 8 • Find the numbers yourself-lawyers[.] (Doc. No. 88-4 at  
 9 16.)
- 10 • No, never convicted of a felony, have you, what you are  
 11 trying to do is get into my life in which by law has  
 nothing to do with any of the cases at all, it called  
 invasion of privacy. (Id.)
- 12 • I wasn't working at that time but, looking for work,  
 13 this is bull your going to pay no matter what. (Id. at  
 20.)
- 14 • I stated all facts in the complaints so read that, I'm  
 15 not typing this over again period. (Id.)
- 16 • U.C.S.D.-phone number is in the book. (Id. at 30.)
- 17 • This letter is in response to the special interrogato-  
 18 ries that I answered I think fairly enough and this is  
 just one of your delay tactics will it's not going to  
 19 work. All the questioned were answered your going to  
 have to work on your part to get the rest. But this is  
 what you will get from me. (Id. at 37.)
- 20 • You will see both papers from U.C.S.D. and Scripps  
 21 Hospital (09cv1141) you better come with an offer before  
 the 15th of March or if I have to wait until July 27th  
 22 at 2:00pm it doubles, if we go to trial it triples, and  
 if you are really as dumb as I think you are and appeal  
 23 it quadruples and I can and will do it just try me.  
 (Id.)
- 24 • [I]f your stupid enough to go to trial I'm going to  
 25 hammer you under [Section] 1983. (Id.)
- 26 • No you have all the forms that are there do some work,  
 I'm done doing your work for you. (Id. at 55.)

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28 <sup>4/</sup> For the sake of readability, the undersigned will refrain from the use of "[sic]" when  
 directly quoting Plaintiff's writings. All direct quotations appear as written.



- Look I've lost sight in my right eye to the point where I'm going blind so you better get up off your asses and get this over with. (Id.)

Moreover, the following examples appear in Plaintiff's opposition to the instant motion and reflect the type of nonsensical, irrelevant rants he engages in:

- You have nothing, Heritage Security attorney are trying to bring back the case over two years and they don't have proof that I was drunk in public or that a crime was ever committed, and it's coming back to bit you in the ass. (Doc. No. 94 at 3.)
- Also this is a racial matter now in which that I'm a strong willed black man without the major **Dollars** they think they can do what they want, but it is not so they are trying to pay off the SDPD and the state courts with there money because or so-called campaign contri-butions to the city attorney's office or have the city attorney office due favors for Higgs, Fletcher, Mack you will see [J]udge Gallo and [J]udge Moskowitz from this called drunk in public case with no M number or date when this event occurred one hand washes the other, how desperate and crooked Higgs, Fletcher, Mack are. (Id. (emphasis in original).)
- I'm going to sue the San Diego City Attorney's Office and also the law firm of Higgs, Fletcher, Mack and for discriminatory acts against me and also have Sam Sherman disbarred watch how I do this and watch how I tear apart Higgs, Fletcher, Mack they don't have any blacks working for them at all. They discriminate against our race in ways watch. Fletcher, Higgs, and Mack tried to already come at me before with bogus stuff and there trying again and this time there going down there mad because there getting their butts hand to them and they did not expect this, **SURPRISE**. (Doc. No. 94-1 at 7 (emphasis in original).)

#### **D. Developments Since The March 25, 2011, Hearing**

Two developments since the March 25, 2011, hearing form the basis for Heritage's motion: (1) Plaintiff's continued refusal to respond to interrogatories despite a court order and (2) Plaintiff's lie about being represented by counsel to successfully avoid being deposed. Each will briefly be set forth immediately below, but discussed more fully in Section II.

1           **1. Refusal to Respond to Interrogatories**

2           At the March 25, 2011, discovery hearing, the undersigned  
3 ordered Plaintiff to supplement his interrogatory responses to (1)  
4 provide his home address, (2) identify his lost wages damages and  
5 how he calculated them, and (3) identify any witnesses or state that  
6 he does not know the identity of any witnesses. (Doc. No. 75 at  
7 1:25-2:2.) Plaintiff continues to refuse to provide Heritage his  
8 home address, but partially responded to the last two interroga-  
9 ries. As to the damages interrogatory, Plaintiff identified his  
10 damages but did not identify how he calculated them. As for the  
11 witness interrogatory, without stating that he does not know the  
12 identity of any witnesses, he states that he could not see any  
13 witnesses because he was face-down on the ground as the security  
14 officers took him into custody.

15           As explained below, Plaintiff's answer to the latter two  
16 interrogatories appear acceptable given Plaintiff's *pro se* status.  
17 However, the undersigned views Plaintiff's continued refusal to  
18 provide his home address a violation of a direct court order and a  
19 deprivation of Heritage's ability to investigate Plaintiff's claims  
20 and defend itself.

21           **2. Plaintiff Lied to Avoid Deposition**

22           In early 2011, Plaintiff foreshadowed that he would avoid  
23 being deposed. In the concluding paragraph of a February 27, 2011,  
24 letter that supplemented discovery responses, he wrote: "This is  
25 all your getting from me move on I don't have to give you anything  
26 else unless you ask for a deposition in person in which your not  
27 going to get, just tell owner of heritage security to give it up or  
28 I going to take his company." (Doc. No. 88-4 at 56.) Then, when

1 the time for his deposition finally arrived, Plaintiff appeared  
2 alone on April 28, 2011, and stated he had found legal counsel who  
3 had advised him to not answer any questions. Plaintiff identified  
4 his counsel as "Alan Speers."<sup>5/</sup> Based on this representation,  
5 Defendants, who had arranged for the presence of both a stenographer  
6 and a videographer, immediately ceased the deposition in order to  
7 avoid continued contact with a represented party and memorialized  
8 these events on the record:

9           The time is now 10:10, and Mr. Lowry has appeared  
10          at the deposition. He indicates he will not go forward  
11          with the deposition, that he's retained an attorney.  
12          The attorney's name is Alan Speers, S-p-e-e-r-s, with  
13          the Law Offices of Alan Speers.

14          I've tried to contact Mr. Speers and left a  
15          message for him on his cell phone. Apparently, Mr.  
16          Speers has indicated to Mr. Lowry that he's not to say  
17          anything at this deposition, so he does not intend to.  
18          So the deposition will not go forward, and we will  
19          renotify the deposition through Mr. Speers.

20          I'll just point out that there has not been a  
21          substitution of attorneys filed in this case nor has  
22          Mr. Speers tried to contact my office to advise that  
23          he's now serving as counsel of record to Mr. Lowry.

24 (Ex. K to Motion, Transcript of Deposition, Doc. No. 88-4 at 70-71.)

25 Counsel then asked Plaintiff whether he was going to say anything,  
26 and Plaintiff silently shook his head. (Id. at 71.)

27          After the failed deposition, counsel was able to speak with  
28          Mr. Spears, who "emphatically denied he represented Plaintiff and  
29          denied advising Plaintiff not to testify." (Motion, Doc. No. 88-1  
30          at 4.) Mr. Spears graciously appeared at the June 20, 2011,  
31          sanctions hearing and provided on-the-record testimony about his  
32          actual conversation with Plaintiff.

33          Mr. Spears testified that he first met Plaintiff as he ate an  
34          omelet at a Denny's restaurant in National City at 4:00 a.m. on

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<sup>5/</sup> The correct spelling of this attorney's last name is actually "Spears."

1 Easter Sunday.<sup>6/</sup> Their conversation initially centered on their  
2 common experience in the military, and Mr. Spears eventually told  
3 Plaintiff that he was an attorney. Plaintiff informed Mr. Spears  
4 that he had to attend a deposition in the coming week and had been  
5 having difficulty finding an attorney to represent him. Plaintiff  
6 asked whether Mr. Spears was willing to represent him, and Mr.  
7 Spears responded that he would evaluate Plaintiff's case and would  
8 then determine if he would represent him. Mr. Spears gave Plaintiff  
9 a personal contact card and instructed him to drop off any paperwork  
10 he had at Mr. Spears's office for review.

11 At the sanctions hearing, the Court questioned Mr. Spears  
12 about meeting Plaintiff and what he specifically conveyed to  
13 Plaintiff. With respect to Plaintiff's representation that Mr.  
14 Spears represented him, the Court engaged Mr. Spears in the  
15 following questioning:

16 THE COURT: Mr. Lowry represented -- and you touched  
17 on this already but let me ask you specifically -- Mr.  
18 Lowry represented at the deposition that he had  
19 retained an attorney or hired an attorney or is now  
20 represented by an attorney or words to that effect.  
During your brief meeting with Mr. Lowry at the  
Denny's on Easter Sunday, did you at any time repre-  
sent to Mr. Lowry that you were now his attorney,  
retained or otherwise?

21 MR. SPEARS: Absolutely not, your Honor. . . .

22 THE COURT: Did you say anything -- looking back in  
23 your mind's eye, did you say or do anything that  
24 could have conveyed the impression to Mr. Lowry that  
you are now his attorney and had entered into an  
attorney-client relationship with him?

25 MR. SPEARS: Absolutely not, your Honor. I told him  
26 I wouldn't do anything until I had a chance to look  
27 over the pleadings. He said he'd make an entire copy  
of his file. He'd bring it by the office. I told  
him if he did that, I would be happy to take a look

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<sup>6/</sup> Easter Sunday fell on April 24, 2011, this year.

1 at it, discuss it with my law partner, and set him up  
2 for an appointment.

3 (Transcript of Hearing, Doc. No. 98 at 21:21-22:19.)

4 With respect to the Plaintiff's representation that Mr.  
5 Spears instructed him not to answer deposition questions, Mr. Spears  
6 testified:

7 Mr. Spears: . . . . I never told him not to testify at  
8 a deposition. I've been a member of the bar of this  
9 court since a long time ago, and I knew -- I know better  
10 than to tell a person not to testify at a scheduled  
11 deposition, your Honor.

12 . . . .

13 THE COURT: Mr. Lowry also had indicated that on April  
14 28th, the day of the deposition, that he was instructed  
15 not to answer any questions. Did you represent -- you  
16 already talked about this a moment ago, but did you  
17 specifically tell him that he was not to answer any  
18 questions at the deposition?

19 MR. SPEARS: Absolutely not, your Honor.

20 THE COURT: Did you even discuss the deposition and what  
21 he should or shouldn't do there?

22 MR. SPEARS: No, your Honor, other than the fact that I  
23 told him that he might want to consider -- he said, "I  
24 have a deposition next week," or whenever the deposition  
25 was set. I said, "Well, you might want to consider  
26 asking the other side for a continuance." That was all  
27 that I said in relation to the deposition.

28 THE COURT: Is there anything -- again, asking you to  
look back, is there anything that you said or did that  
could have conveyed the message that Mr. Lowry should not  
have and shouldn't answer any questions when he arrived  
at the deposition?

MR. SPEARS: Absolutely not, your Honor.

25 (Id. at 20:4-8; 23:9-24:4.) Mr. Spears also testified that  
26 Plaintiff did not appear confused about what Mr. Spears meant by  
27 "asking the other side for a continuance" and did not ask any  
28 follow-up questions about how he could go about doing so. (Id. at

1 27:22-28:9.) In fact, Mr. Spears believed Plaintiff knew what this  
2 meant: "Mr. Lowry spontaneously told me that he was an experienced  
3 paralegal and that he had been conducting this litigation in pro  
4 per, and he seemed, what little bit I did speak with him, fairly  
5 conversant in some legal terms, so I didn't get into [how to seek a  
6 continuance] with him." (Id. at 28:1-5.)

7 After Mr. Spears's testimony, the undersigned questioned  
8 Plaintiff about the representations he had made to Heritage's  
9 counsel at the deposition and the basis for his statements:

10 THE COURT: And did you believe that Mr. Spears was your  
11 attorney after that 10- or 15-minute conversation?

12 MR. LOWRY: In a way -- in a way --

13 THE COURT: Let me finish the question before you  
14 respond, all right? **Did you believe that Mr. Spears was**  
**your attorney? He represented you?**

15 MR. LOWRY: **In a way, I thought that he, you know, he**  
**expressed interest. He expressed interest, you know. Me**  
**thinking -- I just wanted help.**

16 THE COURT: **I understand that, but did you think that he**  
**was your attorney as of that day?**

17 MR. LOWRY: **I don't know. I can't say. I don't know.**  
**He talked like he could, but I don't know. I just -- you**  
**know, it was 4:00 o'clock in the morning.**

18 THE COURT: **All right. Now, did Mr. Spears tell you not**  
**to answer questions at your deposition?**

19 MR. LOWRY: **No, he didn't tell me, and he told me like**  
**this that I could take the time, yeah, to push it back.**  
**I'm -- I wasn't trying to do anything illegal by that.**

20 THE COURT: I'm not asking you that.

21 MR. LOWRY: Yeah, but --

22 THE COURT: But did you contact the attorneys for  
23 Heritage or MTS and ask for a delay in the deposition?

24 MR. LOWRY: No, I didn't. No.

25 THE COURT: And when you got to the deposition, did you  
26 ask for a delay at that point?

1 MR. LOWRY: I -- to retain counsel.

2 THE COURT: No. No.

3 MR. LOWRY: To retain counsel.

4 THE COURT: **Well, from what I've read, you told them that**  
5 **you were not going to answer any questions because your**  
6 **attorney told you not to answer questions.**

7 MR. LOWRY: **I stated -- well, yeah, I did state it like**  
8 **that, but I should have stated it another way.** Like I  
9 told you, I'm not the most experienced person in the  
10 world.

11 THE COURT: Yeah, but the truth is the truth.

12 MR. LOWRY: Yeah.

13 THE COURT: You don't have to be experienced to tell the  
14 truth.

15 MR. LOWRY: Yeah. Well, that's what I stated, and, like  
16 I say, I wasn't trying to delay anything. They can ask  
17 any questions they want, but the questions that I stated  
18 in my complaints are the truth, and that's all I have to  
19 state right there. . . .

20 THE COURT: But you -- but you lied to the attorneys for  
21 Heritage --

22 MR. LOWRY: I didn't lie to them.

23 THE COURT: -- saying that you had an attorney, and your  
24 attorney told you not to answer questions at the deposi-  
25 tion.

26 MR. LOWRY: I did not lie to them about that. No, I  
27 didn't. They might have misconstrued it, but I didn't  
28 lie about it. I --

THE COURT: What did you tell them, then?

MR. LOWRY: Okay. What I told them that I found out, you  
know, that I don't have to answer any of the questions  
that I -- any of the questions at the deposition. They  
even stated -- they even stated that, you know, I can  
leave at any time of the deposition if the questions were  
too hard or whatever or, you know, the questions you feel  
that are used as trick questions, but MTS was conducting  
this. Now, I'm not trying to hide nothing. I ain't got  
nothing to hide. I have nothing to hide at all, and as  
far as the deposition is going -- was to go, I wasn't  
ready. I wasn't ready for it. Mentally -- no. Mentally  
I wasn't ready. And I should have said continuance, used  
a different word. I'm not trying to delay everything.

1 That's what they're saying -- I'm trying to delay the  
2 process. No, I'm not. What they tried to do was spy on  
me.

3 THE COURT: I'm not asking you about that.

4 MR. LOWRY: No, but I'm just saying that.

5 THE COURT: Mr. Lowry, I'm asking you about the deposi-  
6 tion.

7 MR. LOWRY: Yeah, but I wasn't trying to delay the  
8 process, and I didn't, you know, as far as lie to them,  
no. I just --

9 THE COURT: But you did tell them --

10 MR. LOWRY: -- they -- I did show them the card, who I  
talked to.

11 THE COURT: **So you told them that you had an attorney,**  
12 **his name was Alan Spears, and he told you not to answer**  
13 **any questions. That's what you said. Is that right or**  
**wrong?**

14 MR. LOWRY: **He didn't tell me as far as answering no**  
**questions. He didn't say that.**

15 THE COURT: I'm not asking you what he told you. **I'm**  
16 **asking you what you told the attorneys at the deposition.**

17 MR. LOWRY: **What I told the attorneys at the deposition**  
18 **is that I'm trying to retain counsel. That's all. With**  
counsel -- I'm allowed to have counsel . . . .

19 THE COURT: Okay.

20 MR. LOWRY: But, no, hold on. I didn't lie about  
21 anything. I didn't. I'm trying to retain him. And I  
think that's fair. . . . .

22 . . . . .

23 MR. LOWRY: That's all I was trying to do, your Honor.

24 THE COURT: Well, did you tell them that you were trying  
25 to retain counsel or that you in fact had retained  
counsel and that his name was Alan Spears, and that Alan  
Spears told you not to answer any questions?

26 MR. LOWRY: Alan Spears stated that "you really don't  
27 have to answer anything. You're trying to retain  
counsel. You can put it off." I should have said that,  
28 your Honor. I should have said that, yes. I should have  
said it. I should have said it, but --



1 THE COURT: All right, Mr. Lowry.

2 MR. LOWRY: -- I'm just trying to put it off. That's  
3 all. I'm not trying to, you know, like I say, deceive  
the Court or deceive them at all. At all.

4 (Id. at 39:19-44:6 (emphasis added).)

## 5 II. LEGAL STANDARD

6 The Court may impose broad discovery sanctions for failure to  
7 obey a court order that compels discovery, up to and including  
8 "dismissing the action or proceeding in whole or in part." Fed. R.  
9 Civ. P. 37(b)(2)(A)(v).

10 Dismissal and default are appropriate only when circumstances  
11 evidence willful disobedience of court orders or bad faith conduct.  
12 Fjelstad v. Am. Honda Motor Co., 762 F.2d 1334, 1337 (9th Cir.  
13 1985). "[D]isobedient conduct not shown to be outside the control  
14 of the litigant' is all that is required to demonstrate willfulness,  
15 bad faith, or fault." Henry v. Gill Indus., Inc., 983 F.2d 943, 948  
16 (9th Cir. 1993) (quoting Fjelstad, 762 F.2d at 1341). The Court may  
17 consider the party's motivations, and can consider his "dilatory and  
18 obstructive conduct" in the case and other related cases. See Smith  
19 v. Smith, 145 F.3d 335, 344 (5th Cir. 1998).

20 In addition to a finding of willfulness or bad faith, the  
21 Ninth Circuit has provided the following five nonexclusive factors  
22 that the sanctioning court may use to determine whether case-  
23 dispositive sanctions are just:

- 24 (1) [T]he public's interest in expeditious resolution of  
litigation;
- 25 (2) the court's need to manage its dockets;
- 26 (3) the risk of prejudice to the party seeking sanctions;
- 27 (4) the public policy favoring disposition of cases on their  
merits; and
- (5) the availability of less drastic sanctions.

28 Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d

1 1091, 1096 (9th Cir. 2007). Because "factors 1 and 2 support  
2 sanctions and 4 cuts against case-dispositive sanctions, . . .  
3 [factors] 3 and 5, prejudice and availability of less drastic  
4 sanctions, are decisive." Valley Eng'rs v. Electric Eng'g Co., 158  
5 F.3d 1051, 1057 (9th Cir. 1998). Further, "factor 5 involves  
6 consideration of three subparts: whether the court explicitly  
7 discussed alternative sanctions, whether it tried them, and whether  
8 it warned the recalcitrant party about the possibility of dis-  
9 missal." Id. "[W]hat is most critical for case-dispositive  
10 sanctions, regarding risk of prejudice and of less drastic sanc-  
11 tions, is whether the discovery violations 'threaten to interfere  
12 with the rightful decision of the case.'" Id.

### 13 **III. DISCUSSION**

14 Since the March 25, 2011, discovery hearing, Plaintiff  
15 continued to engage in unacceptable conduct, and Heritage continues  
16 to incur costs and attorneys' fees in an attempt to defend itself.  
17 As a result, Heritage's pursuit to defend itself has become  
18 exceedingly and unreasonably difficult thanks to Plaintiff's active  
19 efforts to delay and obstruct the litigation process. Plaintiff  
20 violated a court order and actively lied about being represented by  
21 counsel to avoid being deposed. Moreover, Plaintiff lied to the  
22 undersigned in open court at the sanctions hearing. These acts,  
23 Plaintiff's previous conduct, the inefficacy of the Court's warnings  
24 and orders, and the anticipated inefficacy of lesser sanctions all  
25 combine to inform the undersigned's strong belief that the only  
26 sanction that is practically available to the Court is to dismiss  
27 Plaintiff's cases against Heritage.

28

1     **A.     Plaintiff Has Acted With Willful Disobedience and Bad Faith**

2             Heritage bases its motion on (1) Plaintiff's willful  
3     disobedience of the Court's March 25, 2011, order that he respond to  
4     certain interrogatories and (2) his bad faith conduct in connection  
5     with his deposition. The undersigned addresses each in turn.

6             **1.     Willful Disobedience of Court Order**

7             On March 25, 2011, the Court ordered Plaintiff to provide  
8     supplemental responses to the three special interrogatories below.  
9     Although it appears Plaintiff technically failed to fully respond to  
10    two of the three interrogatories, the undersigned is most concerned  
11    about Plaintiff's refusal to provide Heritage his residence address.

12            **a.     Request for Identification of Witnesses**

13            Special Interrogatory 14 in the 09-CV-898-BTM(WVG) case asks  
14    that Plaintiff "state the name, address, and telephone number of  
15    all" witnesses. (Ex. B, Doc. No 88-4 at 11.) Plaintiff's original  
16    and pre-hearing supplemental responses were essentially vague  
17    references to people who were generally in the area when he and  
18    security personnel clashed.

19            At the March 25, 2011 discovery hearing, the Court asked  
20    Plaintiff whether he knew the names of any persons who potentially  
21    witnessed the events in his amended complaints. He stated that he  
22    could not identify any witnesses. The Court instructed him to  
23    supplement his response and to merely state that he did not know who  
24    the witnesses were. It was clear to all that he could not identify  
25    any witnesses. Plaintiff's subsequent supplemental response, though  
26    more verbose and confusing than necessary, essentially followed the  
27    Court's direction and more or less responded that he did not know  
28

1 who the witnesses were. (Ex. I, Doc. No. 88-4 at 64.) Heritage now  
2 claims that this supplemental response is incomplete.

3       Technically, Heritage is correct. Plaintiff did not  
4 expressly state that he did not know who the witnesses were, as the  
5 Court instructed him to do. Rather, he states that he could not see  
6 any witnesses, which necessarily implies he cannot identify them.  
7 The undersigned is not concerned with Plaintiff's response to this  
8 interrogatory because it is abundantly clear to everyone that  
9 Plaintiff cannot identify any witnesses. He stated as much on the  
10 record at the March 25, 2011, discovery hearing. As a result, the  
11 undersigned does not view Plaintiff's response to this interrogatory  
12 as a material violation--though it is a technical violation--of the  
13 discovery order.

14               **b. Request for Amount and Calculation of Damages**

15       Special Interrogatory 18 in the 09-CV-898-BTM(WVG) case asks  
16 Plaintiff to "state the amount of lost income" he claims and explain  
17 "how that amount was calculated." (Ex. B, Doc. No 88-4 at 12.)  
18 Plaintiff originally defiantly refused to respond: "The amount that  
19 was calculated should not matter Heritage Security will be taught a  
20 valuable lesson this millions of dollars no matter what." (Doc. No.  
21 88-4 at 20.) He then supplemented his response but still provided  
22 no specifics. (Doc. No. 88-4 at 38, 56.)

23       At the discovery hearing, the undersigned provided Plaintiff  
24 the following guidance on how to respond: "You're getting a little  
25 closer to what we're talking about here, but what we're talking  
26 about is, tell me how much you lost, \$1,000, \$2,000, [\$]100,000 -  
27 whatever it is." (Doc. No. 83 at 27.) Plaintiff was also in-  
28 structed to explain how he calculated his claimed lost wages. (Id.)

1 After the hearing, Plaintiff provided the following supplemental  
2 response on March 28, 2011:

3 I would have made \$15.00hr as a forklift operator but for  
4 some reason be on my control they do back round checks  
5 and come to find out Heritage and Metropolitan Transit at  
6 the time I was fighting the first case was trying to find  
7 work at the same time some how the company found out that  
8 I was still fighting the first case, but add the hospital  
bill along with what I could have made six to eight weeks  
over \$7,000.00 along with the hospital bill which totaled  
over \$5,000.00. This is my answer to interrogatory 18  
(09cv0989) but in punitive and compensatory damages it  
will run to millions.

9 (Ex. I, Doc. No. 88-4 at 64.) From this response, the Court gathers  
10 that Plaintiff claims a total of \$2,000 (\$7,000 total loss minus  
11 \$5,000 hospital bill) in lost wages that he would have earned over  
12 the course of six to eight weeks as a forklift operator making  
13 \$15.00 per hour. Given that Plaintiff is proceeding *pro se*, this  
14 response is sufficiently responsive and complies with the Court's  
15 order. Although Plaintiff does not provide the method he used to  
16 arrive at the \$2,000 figure, reverse calculation of that number is  
17 possible based on the other information he provides. Because it  
18 appears Plaintiff did his best to provide an answer, the undersigned  
19 does not believe Plaintiff's supplemental response is a willful  
20 violation of a court order.

21 **c. Request For Plaintiff's Residence Address**

22 Special Interrogatory 4 propounded in the 09-CV-1141-BTM(WVG)  
23 case simply asks Plaintiff to state his "present residential  
24 address." (Doc. No 88-4 at 5.) This interrogatory is routinely  
25 propounded in civil cases, but Plaintiff has refused to answer it  
26 because he does not wish to be investigated or surveilled. The  
27 undersigned deems Plaintiff's continued refusal to answer this  
28 interrogatory a direct violation of a court order.

1 At the March 25, 2011, discovery hearing, the Court accepted  
2 Heritage's proffered reason for this interrogatory's relevance and  
3 ordered Plaintiff, both verbally and in writing, to respond. (Doc.  
4 No. 75 at 2:1-2; Doc. No. 83 at 32:1-8.)

5 On March 28, 2011, Plaintiff served the following supplemen-  
6 tal response:

7 This is the answers for the Interrogatories that I've already  
8 I'm staying with friends who have let me use there motor home  
9 to stay and they don't want know one snooping around there  
10 house or asking questions about me so I've given you the best  
11 that I could, I'm not violating there right to privacy at  
all, you wanted to know where I was staying and the motor  
home is very nice, that's all you can get from me right now.  
I will not jeopardize my friendship for this attorney. This  
is my answer to interrogatory No. 4 (09cv1141).

12 (Ex. I to Motion, Doc. No. 88-4 at 63-64.) This answer followed  
13 multiple meet and confer efforts by Heritage, multiple supplemental  
14 responses, a hearing, and the Court's direct order that Plaintiff  
15 provide his address. In the March 25, 2011, hearing, Plaintiff  
16 stated he understood that he was to provide Defendants his residence  
17 address. (Doc. No. 83 at 32.)

18 At the sanctions hearing, Plaintiff explained why he refused  
19 to prove his home address, as the Court ordered him to do:

20 I gave them an address. I stayed with my friend in his  
21 motorhome, but I did not want to get his family involved in  
22 and them trying to follow me around. That's what they  
basically wanted to do, and it's an invasion of privacy,  
especially my friend's family. He has kids.

23 (Doc. No. 98 at 31:8-13.) However, Plaintiff did not provide  
24 Heritage an address; merely stating that one lives in a motor home  
25 somewhere fails to disclose the precise location of the motor home.  
26 In response, Heritage provided the following explanation for the  
27 necessity of Plaintiff's home address:

1 Mr. Lowry's going to be able to say, "Well, I make  
2 claims for continuing eye injuries, continuing vision  
3 problems," and we can't conduct any sub rosa to see  
4 if that's true or not, to see what sort of activities  
5 Mr. Lowry's engaging in. Meanwhile, we have medical  
records that indicate in fact the doctors can't  
explain how Mr. Lowry has these subjective complaints  
of eye injuries and how his eye injuries haven't  
fully healed.

6 (Id. at 49:18-25.) In other words, Heritage needs an avenue to  
7 investigate Plaintiff's unsubstantiated and medically inexplicable  
8 persisting injuries. Heritage's explanation for why it needs  
9 Plaintiff's address is more than reasonable and is precisely why the  
10 undersigned originally ordered Plaintiff to disclose his address.  
11 Plaintiff has invoked an unspecified blanket right to privacy on his  
12 own behalf and on behalf of the family with whom he lives. However,  
13 Heritage has no interest whatsoever in the host family--only  
14 Plaintiff. Any privacy interest Plaintiff has in his own residence  
15 address is not absolute, as Plaintiff wishes, and in this case is  
16 overwhelmed by Heritage's compelling reasons: relevance grounds,  
17 Plaintiff's unexplained injuries, and Heritage's right to garner  
18 information to defend itself in the three cases that Plaintiff  
19 himself brought. See generally Ragge v. MCA/Universal, 165 F.R.D.  
20 601, 604-05 (C.D. Cal. 1995) (discussing balancing of interests).

21 Unlike the other interrogatories at issue, the undersigned  
22 does not consider trivial Plaintiff's past and continued refusal to  
23 answer this interrogatory. Defendants are entitled to investigate  
24 Plaintiff himself in order to develop defense strategy, including  
25 potential information for impeachment purposes. Without Plaintiff's  
26 residence address, Heritage is deprived of an entire avenue of  
27 litigation strategy that could lead to the discovery of admissible  
28 evidence or develop information that could assist in their defense.

1 Plaintiff's staunch refusal to provide this information, in light of  
2 Plaintiff's alleged eye injuries, thus constitutes a partial  
3 deprivation of Heritage's right to defend itself.<sup>7/</sup> Plaintiff's  
4 desire not to be surveilled is utterly immaterial. After bringing  
5 three cases against Heritage, he cannot now cabin, without any valid  
6 legal basis, Heritage's ability to defend itself whenever the urge  
7 strikes him.

8 Plaintiff's refusal to provide his residence address  
9 apparently also has created other practical problems, as his current  
10 mailing address on the Court's docket is a P.O. Box in National  
11 City, CA. However, Heritage's counsel recently declared that his  
12 office had served Plaintiff with a copy of their opposition to his  
13 summary judgment motion, but that it was returned as "unclaimed."  
14 (Doc. No. 92 at 1-2, 20.) Heritage re-served its opposition on June  
15 2, 2011, to ensure that Plaintiff has a fair opportunity to reply.  
16 Had Heritage known Plaintiff's residence address, they simply could  
17 have mailed the opposition to that address. However, despite  
18 Plaintiff's reassurance that his P.O. Box remains a valid mailing  
19 address, both the Court and Heritage are now left to wonder whether  
20 he will receive future orders, notices, or other paperwork critical  
21 to his cases.<sup>8/</sup>

22 The undersigned deems Plaintiff's continued refusal to  
23 provide his residence address, despite his understanding that he was  
24 ordered to provide it, a direct and willful violation of a court

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26 <sup>7/</sup> The Court does not share Plaintiff's concern that his safety may be at jeopardy if he  
27 discloses his address. Defendants and their counsel have not given the Court any reason  
to believe that Plaintiff's physical well-being is in jeopardy.

28 <sup>8/</sup> The Court asked Plaintiff whether he specifically received the March 25, 2011,  
sanctions warning order. Plaintiff initially emphatically stated that he had received it,  
but then went on to theatrically read the order the Court provided him, equivocate whether  
he had received it, and respond out loud to the order as he read it.



1 order. No ambiguity existed in the Court's order that he was to  
2 provide his "present address, where [he went] every day to live."  
3 (Doc. No. 83 at 32.) Plaintiff expressed no confusion about the  
4 Court's order and stated three times that he understood what he  
5 needed to do. (Doc. No. 83 at 32 ("Okay," "I got you," and "No  
6 problem.")) Given that he fully understood the Court's order, the  
7 undersigned can interpret Plaintiff's defiant supplemental response  
8 above only to mean that he has chosen not to comply.

9 **2. Bad Faith Conduct**

10 Heritage also argues that Plaintiff's conduct in successfully  
11 avoiding deposition constitutes bad faith conduct. Heritage argues  
12 that the events recounted above lead to the conclusion that  
13 "Plaintiff lied about retaining counsel simply to avoid testifying  
14 at his deposition. This deceptive tactic was designed to delay,  
15 disrupt and stifle discovery. If this litigation is allowed to  
16 proceed, Plaintiff will certainly continue to evade discovery[,]  
17 making it impossible for Heritage to defend itself." (Doc. No. 88-1  
18 at 4.) The undersigned finds that the weight of evidence overwhelm-  
19 ingly supports the conclusion that Plaintiff lied and acted in bad  
20 faith to avoid deposition and frustrate Heritage's pursuit of the  
21 truth.

22 Plaintiff's testimony at the sanctions hearing reveals at  
23 best that he was not mentally prepared for the deposition and at  
24 worst that this was yet another intentional ploy to obstruct  
25 Defendants' legitimate efforts at obtaining discovery. (Doc. No. 98  
26 at 42:8-10.) He admitted that he did not have any basis to believe  
27 that Mr. Spears actually represented him. (Id. at 39:22-40:7 ("I  
28 don't know. I can't say. I don't know. He talked like he could,

1 but I don't know. I just -- you know, it was 4:00 o'clock in the  
2 morning.".) Plaintiff's equivocal testimony, juxtaposed with Mr.  
3 Spears's credible testimony, leaves no doubt in the undersigned's  
4 mind that Plaintiff did not mistakenly believe that Mr. Spears  
5 represented him, especially since Mr. Spears told Plaintiff that he  
6 would first review Plaintiff's files and then discuss representa-  
7 tion. (Doc. No. 98 at 23:18-23.) Despite lacking a valid basis to  
8 believe Mr. Spears represented him, Plaintiff appeared at deposition  
9 and told counsel that he was then represented by counsel and that  
10 counsel had advised him not to answer any deposition questions.  
11 There is no doubt that Plaintiff did this, and Plaintiff did not  
12 object whatsoever at the deposition when counsel stated on the  
13 record "that [Plaintiff has] retained an attorney. The attorney's  
14 name is Alan Speers . . . with the Law Offices of Alan Speers. . .  
15 . . . Apparently, Mr. Speers has indicated to Mr. Lowry that he's not  
16 to say anything at this deposition, so he does not intend to."  
17 (Doc. No. 88-4 at 70-71.) Nonetheless, Plaintiff appeared before  
18 the Court and lied directly to the Court twice about what he told  
19 counsel on that day: "What I told them that I found out, you know,  
20 that I don't have to answer any of the questions that I -- any of  
21 the questions at the deposition," and "What I told the attorneys at  
22 the deposition is that I'm trying to retain counsel. That's all."  
23 (Doc. No. 98 at 41:24-42:1; 43:8-10.) These blatant falsehoods are  
24 directly contradicted by the deposition transcript as well as  
25 counsel's testimony at the sanctions hearing. (See id. at 56:23-  
26 60:18 (testimony of attorney Robert Fitzpatrick).) Plaintiff  
27 clearly said much more than he will admit even to the Court.

28

1           Plaintiff also admitted that Mr. Spears in fact did not  
2   advise him to not answer deposition questions. (Id. at 43:3-4 ("No,  
3   he didn't tell me, and he told me like this that I could take the  
4   time, yeah, to push it back.").) Although he concedes that he  
5   should have asked for a continuance, (id. at 43:23-44:2), the fact  
6   remains that the actual words he used conveyed a wildly different--  
7   and untrue--message. Instead, without any basis in truth, he  
8   represented that he was then-presently represented by an attorney  
9   and that attorney had told him not to answer any questions. The  
10   undersigned can come to no other conclusion other than Plaintiff in  
11   fact knowingly lied to avoid being deposed because he was not  
12   "mentally" prepared.

13           Based on the above, the undersigned finds overwhelming  
14   evidence that Plaintiff engaged in bad faith conduct in order to  
15   avoid being deposed. He lied both about being represented by  
16   counsel and about counsel's advice that he should say nothing at the  
17   deposition. Even assuming, *arguendo*, that Plaintiff was somehow  
18   mistaken that Mr. Spears represented him, he could not possibly have  
19   been mistaken about Mr. Spears's alleged advice, as counsel stated  
20   in no uncertain terms that he never advised Plaintiff to not answer  
21   deposition questions. The undersigned completely accepts Mr.  
22   Spears's representation, as he in fact would not have had any legal  
23   to give such advice. Moreover, at the sanctions hearing, Plaintiff  
24   admitted that Mr. Spears did not advise him to avoid questioning.

25           Plaintiff's intentionally deceitful conduct resulted in  
26   unnecessary expense to Defendants, yet another delay of the  
27   litigation process, and, more significantly, the frustration of  
28   Heritage's ability to engage in one of the most widely-used and

1 informative discovery tools used in litigation today. Based on the  
 2 foregoing, the undersigned finds that Plaintiff's conduct was in bad  
 3 faith.

4 **B. Terminating Sanctions Are Appropriate**

5 After considering the five factors that bear on whether case  
 6 dispositive sanctions are just, the undersigned concludes that  
 7 dismissal is a just and appropriate sanction.<sup>9/</sup>

8 **1. Public Interest in Expeditious Resolution of Litigation**

9 This factor weighs in favor of dismissal, as Plaintiff's past  
 10 and anticipated future conduct is the antithesis of expeditious  
 11 resolution. Plaintiff has unnecessarily undermined the smooth flow  
 12 of litigation, and the undersigned fully anticipates that he will  
 13 continue to do so in the future. Although Plaintiff routinely  
 14 professes that he desires to resolve these cases quickly, his own  
 15 actions have caused the opposite result. Plaintiff's adamant belief  
 16 to the contrary notwithstanding, Defendants have done nothing to  
 17 delay these cases. Moreover, Plaintiff's vision of a quick  
 18 resolution is simply that Heritage pays him all, or substantially  
 19 all, of the money he demands, which is in the multi-million dollar  
 20 range. Therefore, were Plaintiff's cases allowed to proceed, the  
 21 public's interest in expeditious resolution of cases will very  
 22 likely not be satisfied.

23 **2. The Court's Need To Manage Its Docket**

24 The Court's need to manage its docket is great, as the  
 25 Southern District of California is one of the busiest districts in

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26  
 27 <sup>9/</sup> The undersigned acknowledges that these factors are not "a mechanical means of  
 28 determining what discovery sanction is just, . . . a series of conditions precedent before  
 the judge can do anything, [or] a script for making what the district judge does  
 appeal-proof," but merely "a way for a district judge to think about what to do." Valley  
Eng'rs v. Elec. Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998). Nonetheless, these factors  
 demonstrate that dismissal is just under the circumstances here.

1 the nation. Despite the Court's impacted docket, Plaintiff's  
2 behavior has necessitated the Court's direct intervention on  
3 multiple occasions to referee disputes that ordinarily do not  
4 materialize in the vast majority of civil cases on the Court's  
5 calendar. Further, Plaintiff's numerous *ex parte* communications  
6 with chambers have consumed additional Court resources. The  
7 undersigned fully expects that Plaintiff's three cases will continue  
8 to require its active supervision. The undersigned is mindful that  
9 Plaintiff is representing himself and that *pro se* litigants often  
10 require extra attention and time. This is not a problem, and the  
11 undersigned welcomes the opportunity to assist *pro se* litigants to  
12 the extent that fairness, neutrality, and impartiality allow.  
13 However, Plaintiff has taken advantage of the Court's resources,  
14 willingness to allow him leeway, and repeatedly has broken his  
15 promises to conduct himself in a civil and courteous manner in his  
16 dealing with the Court and counsel. His behavior has resulted in  
17 several unnecessary court appearances and the issuance of orders, as  
18 well as this extensive Report and Recommendation, that ordinarily do  
19 not issue, even in other *pro se* cases. In the future, such a high  
20 level of supervision will necessarily consume judicial resources  
21 that could be devoted to other matters.

22 **3. Prejudice to Other Parties From the Discovery Violations**

23 "A defendant suffers prejudice if the plaintiff's actions  
24 impair the defendant's ability to go to trial or threaten to  
25 interfere with the rightful decision of the case." Adriana Int'l  
26 Corp. v. Lewis & Co., 913 F.2d 1406, 1412 (9th Cir. 1990); see also  
27 Henry v. Gill Indus., Inc., 983 F.2d 943, 948 (9th Cir. 1993). The  
28

1 foregoing quote succinctly and accurately reflects the prejudice  
2 Heritage has suffered and will continue to suffer.

3           Plaintiff's home address is material to Heritage's defenses  
4 because it allows Heritage to explore an avenue of defense strategy  
5 available to them. Parties routinely provide this information to  
6 litigation opponents in response to the routine interrogatory  
7 Heritage propounded. Plaintiff's belief to the contrary notwith-  
8 standing, the request for his address is not extraordinary.  
9 Heritage's inability to pursue this avenue of investigation results  
10 in its lessened ability to mount a complete defense, a result that  
11 will prejudice the company. This is especially true here, where  
12 Plaintiff's complaints of persisting eye injuries, which bear  
13 directly on his damages claim, are apparently medically unsupported  
14 and unexplained.

15           Plaintiff's overall conduct in this case also plays a role in  
16 the undersigned's analysis. Plaintiff has conducted himself  
17 throughout this litigation in an aggressive, defiant manner that has  
18 led to unnecessary delay of the litigation process and difficulty  
19 for Heritage. He has cooperated only when he felt like doing so and  
20 defied a court order because he disagrees with it. The net result  
21 of his conduct is delay of the case and subversion of the truth-  
22 finding process, which will ultimately result in Heritage's  
23 inability to completely defend itself at trial. Discovery is a  
24 crucial part of litigation and allows each party the opportunity to  
25 obtain information and evidence to prove its case or defend itself.  
26 But when one party obstructs the process to such a degree that  
27 another party cannot engage in discovery, the prevented party  
28 ultimately cannot fully defend itself.

1 In addition to Plaintiff's conduct throughout this case, the  
2 undersigned is also very troubled by Plaintiff's deceptive actions  
3 at his deposition in particular. Plaintiff both lied and prevented  
4 Heritage from taking his deposition. If Heritage cannot depose  
5 Plaintiff, it cannot pursue a critical litigation tool and cannot  
6 muster evidence in its own defense as a result. Heritage's  
7 inability to do so not only prejudices the company, it does so in a  
8 severe manner. More significantly, however, Plaintiff's very act of  
9 lying casts a pall of doubt over everything Plaintiff says and does  
10 in the future and "threaten[s] to interfere with the rightful  
11 decision of the case." To compound his lie at deposition, Plaintiff  
12 is also willing to lie to the Court. The litigation process is one  
13 of truthfinding. When one party takes it upon himself to subvert  
14 the truth, the outcome of the case is tainted by doubt and fairness  
15 suffers.

16 Finally, it is abundantly clear that the Court's orders have  
17 little to no impact on Plaintiff's behavior, and he will continue  
18 his behavior into the future. Plaintiff has unnecessarily made the  
19 discovery process excruciatingly difficult, if not impossible. Even  
20 if Plaintiff sits for deposition, the Court is certain that he will  
21 make every effort to disrupt the deposition, avoid answering  
22 questions, respond with extreme aggression or argument, and to  
23 generally disrupt Heritage's pursuit of any information that could  
24 even remotely help in its defense.<sup>10/</sup> This strategy has been  
25 Plaintiff's *modus operandi* throughout this case, as evidenced by his  
26 correspondences, discovery responses, and other conduct, and there

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27  
28 <sup>10/</sup> Although the Court could order Plaintiff's deposition, Plaintiff's demonstrated ability and willingness to lie and obstruct the process casts doubt over any testimony he may provide.

1 is absolutely no reason to believe he can constructively participate  
2 in the future.<sup>11/</sup> Moreover, Plaintiff will lie if he believes doing  
3 so would benefit him.

4 The Third Circuit Court of Appeals long ago saliently  
5 explained the rationale for imposing terminating sanctions for a  
6 plaintiff's obstructive behavior during discovery. The Court wrote:

7 Appellants advance the argument that it was error for  
8 the trial court to penalize them with . . . dismissal  
9 without first ordering them to appear for their  
10 scheduled depositions. Rule 37 sanctions are contem-  
11 plated when there has been virtually total noncompli-  
12 ance with discovery. Yet, a direct order by the  
13 Court . . . is not a necessary predicate to imposing  
14 penalties under Rule 37(d). When it has been deter-  
15 mined that a party has wilfully failed to comply with  
16 the rules of discovery, it is within the discretion  
17 of the trial court to dismiss the action. Litigants  
may oppose discovery requests by seeking a protective  
order from the court; they cannot be permitted to  
frustrate discovery by refusing to comply with a  
proper request. For courts to permit litigants to  
disregard the responsibilities that attend the  
conduct of litigation would be tantamount to "encour-  
aging dilatory tactics." The dismissal sanction,  
although severe, is a necessary tool, both to punish  
in the individual action and to deter future abuses  
of the discovery process.

18 Al Barnett & Son, Inc. v. Outboard Marine Corp., 611 F.2d 32, 35-36  
19 (3d Cir. 1979) (citations omitted). Without opposing discovery in  
20 Court, Plaintiff has taken it upon himself to dictate how discovery  
21 shall proceed, which interrogatories he wishes to answer and to what  
22 extent he wishes to answer them, and how and when deposition shall  
23 proceed--or not. Plaintiff operates by his own rules, and the rules  
24 by which Heritage is bound seem to matter little to him.

25 Not only has Heritage suffered serious prejudice to date, it  
26 will continue to suffer severe prejudice into the future. Such  
27

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28 <sup>11/</sup> The root cause of this inability is, as the undersigned told Plaintiff at the October 2010 ENE, his intense emotions and detestation for Defendants and their counsel.



1 prejudice will increase by leaps and bounds as the time for trial  
2 nears and Heritage has not been able to garner information in its  
3 defense.

4 **4. Public Policy Favoring Disposition on The Merits**

5 Although this factor ordinarily cuts against imposing case-  
6 dispositive sanctions, the undersigned does not believe that this  
7 important public policy would be fulfilled if Plaintiff's cases are  
8 allowed to continue. Plaintiff's obstructive conduct will very  
9 likely mean that a true adjudication on the merits may never be  
10 achievable in the end.

11 **5. Whether Less Drastic Sanctions Are Available**

12 On March 25, 2011, the undersigned expressly notified  
13 Plaintiff that case-dispositive sanctions could issue. (Doc. No.  
14 75.) Plaintiff then proceeded to violate a court order, lie, and  
15 evade deposition. The undersigned is certain that any sanction  
16 short of termination of these cases will ultimately fail to reign in  
17 Plaintiff's conduct or compel him to conform his behavior. This  
18 assessment is based on the undersigned's observation of Plaintiff;  
19 multiple unheeded warnings, both informally on the telephone and in  
20 person and formally on the record and in written orders; his  
21 continued failure to abide by the Court's orders; and his active  
22 obstruction of the litigation process. Stern warnings have not  
23 worked, the possibility of lesser sanctions have not worked, and  
24 monetary sanctions will be empty and ineffective because Plaintiff  
25 has qualified to proceed *in forma pauperis* and does not have any  
26 assets. (See Doc. Nos. 2, 3 (IFP motion and order granting  
27 motion).)  
28

Moreover, issue and claim preclusion sanctions will also be ineffective. Heritage will continue to suffer severe prejudice short of precluding Plaintiff from presenting evidence in support of all of the issues and claims in this case. This is because Plaintiff has demonstrated a wholesale and routine propensity to prevent Heritage from gathering evidence in general in its own defense. This is not a case where a party violated one isolated discovery order or refuses to produce just one document, the punishment for which could be to preclude evidence on a discrete issue or claim. When a party demonstrates a systematic practice of obstructing an opposing party's discovery efforts, selective issue and claim preclusion will not ameliorate the overall prejudice the aggrieved party suffers. Plaintiff's continued obstructive conduct will necessarily lead to the preclusion of a growing list of issues.

Based on experience and observation, the undersigned can come to no other conclusion other than the futility of lesser sanctions and that the only effective or practical solution here is dismissal.

**C. This Case Compared to Other Cases**

Although termination of a plaintiff's case pursuant to Rule 37 is one of the most severe of sanctions, courts have imposed this sanction where appropriate. In the context of depositions, most cases impose this sanction for missing or avoiding several depositions. What sets the instant cases apart from the ones below is Plaintiff's active deceit to thwart deposition, as opposed to passive avoidance.

In Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), the Ninth Circuit upheld the district court's entry of

1 default against an individually-named defendant after he failed to  
2 appear for several depositions and his counsel informed the court  
3 that he would not appear for deposition due to poor health. Dolman,  
4 333 F.3d at 266-70. Although there was "doubt as to whether claimed  
5 disability was genuine," id. at 266, the district court's entry of  
6 default was not a result of any active deception, but was based,  
7 *inter alia*, on the defendant's passive acts of not appearing for  
8 multiple depositions and indicating that he would submit to  
9 deposition on his own terms. See id. at 267-69.

10 In Hall v. Johnston, 758 F.2d 421 (9th Cir. 1985), the Ninth  
11 Circuit affirmed entry of default against a defendant who failed to  
12 appear at two noticed depositions without any justification. The  
13 sanctioned party had two opportunities to appear for two noticed  
14 depositions, but failed to appear at both without justification.  
15 Id. at 422. The sole basis for entry of default against the  
16 sanctioned party was his failure to appear at two depositions. See  
17 id. at 424-25. The Ninth Circuit affirmed the trial court's entry  
18 of default. Id. at 425. Significantly, beyond missing two  
19 depositions, there is no indication in Hall that the sanctioned  
20 party had acted improperly or in bad faith at any other time during  
21 the life of the case.

22 More recently, the Ninth Circuit affirmed, although by  
23 unpublished memorandum disposition, a district court's dismissal  
24 based on "failure to prosecute where [the plaintiff] failed to  
25 respond to discovery requests, attend her deposition, produce  
26 initial disclosures, submit a Pretrial Order, attend the final  
27 Pretrial Conference, or file an opposition to defendant's Motion for  
28 Terminating Sanctions." Drumgoole v. Am. Airlines, Inc., 316 Fed.

1 Appx. 606, 607 (9th Cir. 2009). All of the above conduct involved  
2 passive behavior such as failing to attend deposition.

3 Finally, the Seventh Circuit also recently affirmed dismissal  
4 of a pro se plaintiff's case for his "refusal to sit for a deposi-  
5 tion and otherwise comply with discovery," which included failing to  
6 produce documents. Oliva v. Trans Union, LLC, 123 Fed. Appx. 725,  
7 727 (7th Cir. 2005). Again, this case involved a passive failure to  
8 attend deposition or produce documents, rather than overt deceptive  
9 conduct.

10 In contrast to the cases above, Heritage's motion is based  
11 on, *inter alia*, conduct at only one deposition rather than at  
12 multiple depositions. However, the nature of Plaintiff's conduct is  
13 significantly more reprehensible, as he took the affirmative, active  
14 step of lying in order to avoid deposition. The act of actively  
15 lying is markedly more sinister than passive avoidance by failing to  
16 appear. Even one demonstrated incident of lying establishes the  
17 capacity and willingness to obstruct the truth finding process,  
18 flouts the integrity of the process, and casts heavy doubt on its  
19 fairness. See Anheuser-Busch, Inc. v. Natural Beverage Distribs.,  
20 69 F.3d 337, 348-49 (9th Cir. 1995) (discussing deceit in the  
21 context of the Court's inherent authority to impose sanctions, not  
22 under Rule 37; "It is well settled that dismissal is warranted  
23 where, as here, a party has engaged deliberately in deceptive  
24 practices that undermine the integrity of judicial proceedings:  
25 'courts have inherent power to dismiss an action when a party has  
26 willfully deceived the court and engaged in conduct utterly  
27 inconsistent with the orderly administration of justice.'")  
28 (citation omitted). Plaintiff also lied to the Court at an on-

1 record hearing. The Court should not have to wait for more lies to  
2 surface before being able to act. Simply put, Plaintiff's conduct  
3 in this case has been utterly inconsistent with the orderly  
4 administration of justice, and this case is in line with the  
5 aforementioned cases that have affirmed the imposition of terminat-  
6 ing sanctions.

7 **D. Heritage Should Bear Its Own Costs**

8 Heritage seeks \$2,467.50 in costs incurred from the failed  
9 deposition. However, based on the balance of equities, the  
10 undersigned recommends that costs not be awarded to Heritage.

11 The Federal Rules of Civil Procedure require that the Court  
12 award Defendants "reasonable expenses, including attorney's fees"  
13 "[i]nstead of or in addition to" terminating sanctions. Fed. R.  
14 Civ. P. 37(b)(2)(C). The award of expenses under this rule are  
15 mandatory unless Plaintiff can show that his conduct was "substan-  
16 tially justified" or if "other circumstances make an award of  
17 expenses unjust." Id. Based on the discussion above, Plaintiff  
18 cannot show that his conduct was justified in any way, much less  
19 substantially so. However, as explained below, other circumstances  
20 render the award of costs unjust.

21 The practical reality here is that Plaintiff is proceeding *in*  
22 *forma pauperis* and has no assets against which Heritage could  
23 collect a costs award. (See Doc. Nos. 2, 3 (IFP motion and order  
24 granting motion).) Further, given Plaintiff's financial state, any  
25 award against him would likely impose an unjust burden. The  
26 undersigned is aware that Plaintiff may have to travel to the East  
27 Coast for family reasons, and any award against him may prevent him  
28 from doing so. On the other hand, Heritage, a business entity, can

1 much more readily absorb its costs. To be sure, the undersigned  
2 does not wish to trivialize the fact that Heritage incurred costs as  
3 a direct result of Plaintiff's egregious conduct, but the balance of  
4 equities nonetheless favors Heritage bearing its own costs here.

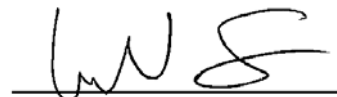
5 **V. Conclusion**

6 Based on the foregoing, the undersigned RECOMMENDS that  
7 Heritage's motion be GRANTED IN PART and Plaintiff's claims in all  
8 three cases against Heritage be dismissed. The undersigned further  
9 RECOMMENDS that Heritage's motion be DENIED IN PART and costs not be  
10 awarded to Heritage.

11 This report and recommendation of the undersigned Magistrate  
12 Judge is submitted to the United States District Judge assigned to  
13 this case, pursuant to the provisions of 28 U.S.C. Section  
14 636(b)(1).

15 IT IS ORDERED that **no later than August 8, 2011**, any party to  
16 this action may file written objections with the Court and serve a  
17 copy on all parties. 28 U.S.C. § 636(b)(1). The document should be  
18 captioned "Objections to Report and Recommendation." The parties  
19 are advised that failure to file objections within the specified  
20 time may waive the right to raise those objections on appeal of the  
21 Court's order. Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir.  
22 1991).

23 DATED: July 7, 2011

24  
25 

26 Hon. William V. Gallo  
27 U.S. Magistrate Judge  
28